

1 **WO**

2  
3  
4  
5  
6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
8

9 David T. Schrock; Jodi M. Esch, )

No. CV 11-0567-PHX-JAT

10 Plaintiffs, )

**ORDER**

11 vs. )

12 Federal National Mortgage Association; )  
13 CitiMortgage, Inc., )

14 Defendants. )  
15

16 At the time this case was removed, a fully briefed motion for a temporary restraining  
17 order (“TRO”), which had been argued to the Superior Court Judge, was pending. Plaintiffs  
18 are seeking to enjoin a forcible detainer action against them in state court, wherein they are  
19 going to be removed from their home.

20 **I. Factual Background**

21 The time line of this case is as follows. Plaintiffs purchased the home in September  
22 2003. In February 2009, they fell behind on their payments. In July 2009, CR Title  
23 substituted in as Trustee and noticed a Trustee sale of the residence for November 4, 2009.  
24 In August 2009, Plaintiffs allege they contacted CitiMortgage, Inc. to attempt to modify their  
25 loan.<sup>1</sup> Plaintiffs allege that CitiMortgage agreed to a loan modification, with a reduced  
26 monthly payment on a forty year repayment schedule. Plaintiffs began making this modified  
27

28 <sup>1</sup> It appears undisputed on this record that CitiMortgage is the current lender.

1 payment in September 2009.<sup>2</sup> While Plaintiffs were negotiating a modification, Plaintiffs  
2 inquired about the status of the Trustee sale and were advised by CitiMortgage that they  
3 should ignore all correspondence from CitiMortgage regarding foreclosure because Plaintiffs  
4 had requested a modification. Between August 2009 and June 2010, Plaintiffs allege that  
5 they repeatedly requested that CitiMortgage send them written confirmation of the  
6 modification; and the CitiMortgage said it would send the written documentation at a later  
7 time.

8 When Plaintiffs made their June 2010 modified payment, CitiMortgage rejected the  
9 payment. At this point, Plaintiffs allege that they were advised by CitiMortgage that they  
10 were not eligible for a loan modification. After CitiMortgage rejected the June 2010  
11 payment, CitiMortgage advised Plaintiff Esch that a Trustee sale of the house was scheduled  
12 for June 12, 2010.<sup>3</sup>

13 On August 11, 2010, Plaintiffs filed for bankruptcy. On December 15, 2010, the  
14 Bankruptcy Judge granted CitiMortgage's motion for relief from the automatic stay. On  
15 January 24, 2011, CR Title Services, Inc., as Trustee, sold the home to Defendant Federal  
16 National Mortgage Association ("Fannie Mae"). On February 23, 2011, Fannie Mae filed  
17 a Forcible Detainer action against Plaintiffs.

## 18 **II. Analysis**

19 In the motion for TRO, Plaintiffs seek to restrain and enjoin Defendants from  
20 "proceeding with or maintaining any eviction action pursuant to A.R.S. § 12-1171, *et seq.*,  
21 for possession of Plaintiffs' residence located at 3510 West Riordan Ranch Road, Phoenix,  
22 Arizona 85085, or from executing on any judgment from such an eviction." Doc. 1-1 at 3.

---

24 <sup>2</sup> After reaching this agreement in August 2009, Plaintiffs allege that in September  
25 2009, CitiMortgage modified the agreement by advising Plaintiffs that they were in a three  
26 month trial of the loan modification and that they had to timely make their modified  
27 payments to qualify for a permanent modification after the trial period.

28 <sup>3</sup> This sale was postponed. In fact, from the originally noticed date, to the sale date,  
the Trustee postponed the sale 15 times.

1 In support of this requested relief, Plaintiffs argue that the Trustee sale was a “wrongful  
2 foreclosure” and invalid because the Deed of Trust was reinstated without notice to Plaintiffs,  
3 in violation of A.R.S. § 33-801; and, Plaintiffs request that the Trustee sale be set aside.

4 **A. Court’s Authority to Issue a TRO**

5 For purposes of this request for TRO, the Court will first consider the remedies  
6 available to Plaintiffs. In their response to the motion for TRO, Defendants argue that as a  
7 matter of abatement, this Court should defer to the first filed action, i.e. the forcible detainer  
8 action. The abatement cases cited by Defendants are exclusively state law cases applying  
9 state procedural rules; thus, they would not apply in federal court.

10 However, a federal court cannot sit as an appellate court over a state court judgment.  
11 *See generally Exxon Mobile v. Saudi Basic Industries*, 544 U.S. 280, 284 (2005).  
12 Additionally, even if the state court action has not reached a final judgment, “[t]he *Younger*  
13 abstention doctrine, as originally articulated by the Supreme Court, forbids federal courts  
14 from staying or enjoining pending state court proceedings.” *AmerisourceBergen Corp. v.*  
15 *Roden*, 495 F.3d 1143, 1147 (9th Cir. 2007) (internal quotations omitted) (*citing Younger v.*  
16 *Harris*, 401 U.S. 37, 41 (1971));<sup>4</sup> *see also* 28 U.S.C. § 2283.

17 Because the TRO was fully briefed before this case was removed, neither party has  
18 discussed any of these doctrines and whether they would prevent this Court from issuing the  
19 requested TRO. Additionally, the Court notes that Plaintiffs did not request that the forcible  
20 detainer action itself be enjoined, but instead asked that Defendants be enjoined from  
21 enforcing any judgment arising from the forcible detainer action. The Court will require the  
22 parties to file supplemental briefing on this issue, and particularly whether this Court has the  
23 authority to grant the relief Plaintiffs request.

---

24  
25 <sup>4</sup> *AmerisourceBergen* directed the district court to apply a four-prong test to  
26 determine whether abstention was appropriate; the federal court should abstain when: 1)  
27 there are ongoing state judicial proceedings, 2) the proceedings implicate important state  
28 interests; 3) the state proceedings provide the plaintiff with an adequate opportunity to raise  
federal claims, and 4) the federal court’s action would enjoin, or have the practical effect of  
enjoining, ongoing state court proceedings. 495 F.3d at 1148-49.

1           **B.     Notice**

2           Substantively, Plaintiffs argue that this Court can invalidate the Trustee's deed  
3 because Plaintiffs were not given proper notice of the sale. Generally, under A.R.S. § 33-  
4 811(C), "[t]he trustor, its successors or assigns . . . shall waive all defenses and objections  
5 to the sale not raised in an action that results in the issuance of a court order granting relief  
6 pursuant to Rule 65, Arizona rules of civil procedure, entered before 5:00 p.m. mountain  
7 standard time on the last business day before the scheduled date of the sale." Thus, § 33-811  
8 requires Plaintiffs to assert any objections to and obtain injunctive relief from the trustee's  
9 sale prior to such sale or risk losing their rights to object. *See Spielman v. Katz*, 2010 WL  
10 4038838, \*3 (D. Ariz. 2010).<sup>5</sup> However, the defense of lack of notice is not waived by  
11 A.R.S. § 33-811(C). *Martenson v. RG Financing*, 2010 WL 334648, \*8-\*9 (D. Ariz. 2010)  
12 (concluding that the plaintiff does not waive certain notice objections irrespective of the  
13 trustee's sale).

14           Here, there are multiple issues on which the Court will require supplemental briefing.  
15 First, the parties will address whether the provisions of A.R.S. § 33-807.01 (2010) apply to  
16 this sale, and if yes, whether Defendants complied.

17           Next, the parties will address whether the Court may consider the evidence presented  
18 by Defendants in the supplement required by the state court. Specifically, Plaintiffs argue  
19 that the declarations filed by Defendants are inadmissible hearsay. While declarations are  
20 sometimes admissible in Federal court (*see* 28 U.S.C. § 1746(2)), unlike in state court, for  
21 a declaration to be admissible, the declaration must be dated. These declarations are not  
22 dated. Thus, the parties shall address whether this Court should consider the declarations.  
23 Assuming the Court strikes the declarations, the parties shall brief whether the result is that  
24 this Court should invalidate the Trustee's deed due to the failure to the Trustee to strictly  
25

---

26  
27           <sup>5</sup> This Court has not addressed whether the waiver provisions of A.R.S. § 33-811(C)  
28 apply to the newly exacted A.R.S. § 33-807.01 (2010).

1 comply with the Deed of Trust statutes.<sup>6</sup> The Court recognizes that Defendants correctly cite  
 2 *Kelly v. Nationsbanc*, 17 P.3d 790, 795 ¶25 (Ariz. App. 2001), for the proposition that  
 3 Plaintiffs had a duty to stay appraised of the postponed sale date. However, for Plaintiffs to  
 4 stay so appraised, Defendants must have strictly complied with the postponement provisions  
 5 of the Deed of Trust statutes. Thus, the parties must brief whether Defendants inability to  
 6 prove strict compliance results in an invalidation of the deed.

7 Third, the parties shall address whether the intervening actions by the lender or its  
 8 agents could cause the Trustee to be ineligible to postpone the sale and instead required to  
 9 give notice of a new sale. Specifically, once a Trustee sale is properly noticed, the Trustee  
 10 may postpone the sale as follows:

11 The person conducting the sale may postpone...the sale from time to time...by  
 12 giving notice of the new date, time and place by public declaration at the time  
 13 and place last appointed for the sale. Any new sale date shall be a fixed date  
 14 within ninety calendar days of the date of the declaration. After a sale has  
 15 been postponed..., the trustee, on request, shall make available the date and  
 16 time of the next scheduled sale...until the sale has been conducted or  
 17 canceled.... No other notice of the postponed, continued or relocated sale is  
 18 required except as provided in subsection C of this section.

19 A.R.S. § 33-810(B).

20 However, the question here is: if the lender implies to the borrower that the sale has  
 21 been canceled, can the Trustee still postpone the sale without giving new notice.  
 22 Specifically, in this case, Plaintiffs allege that CitiMortgage employees told them to ignore  
 23 all correspondence from CitiMortgage regarding foreclosure proceedings (Doc. 1-2 at 3) and  
 24 that everything was on hold and nothing would be commenced because Plaintiffs had sought  
 25 a modification. *Id.* A sub-issue is whether Plaintiffs could rely on such representations from  
 26 the lender, rather than the Trustee who noticed the sale. A final sub-issue is whether  
 27 Plaintiffs in fact cured their default by making the modified payments, thereby requiring the  
 28 Trustee to cancel the sale under A.R.S. § 33-813(E) and (F), which would in turn require new

---

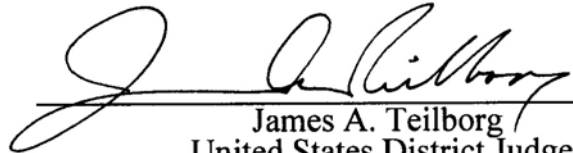
29 <sup>6</sup> In other words, the parties shall address whether Plaintiffs are entitled to a jury trial  
 30 on this issue, or whether the Court should exercise its equitable powers to order Fannie Mae  
 31 to reconvey the house back to Plaintiffs, subject to the Deed of Trust.

1 notice.

2 **III. Supplemental Briefing**

3 **IT IS ORDERED** that by Tuesday, April 5, 2011, the parties shall file a supplemental  
4 briefs addressing all issues raised herein. Each supplemental brief shall not exceed 20 pages.

5 DATED this 31<sup>st</sup> day of March, 2011.

6  
7  
8   
9 James A. Teilborg  
10 United States District Judge  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28